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UNREPORTED

**IN THE COURT OF SPECIAL APPEALS
OF MARYLAND**

No. 1470

September Term, 1981

ALLEN ERNEST YOUNG,

V.

STATE OF MARYLAND

Moore
McDaniel
Rasin, Jr., George B.
(Specially Assigned), JJ.

Per Curiam

Filed: July 21, 1982

At the conclusion of a jury trial in the Circuit Court for Harford County, appellant, Allen Ernest Young, was convicted of assault with intent to murder and use of a handgun in the commission of a crime of violence. On September 4, 1981, he was sentenced to a term of fifteen years incarceration for the assault with intent to murder conviction and to a consecutive five year term for the handgun conviction.

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On appeal, appellant contends: 1) the lower court erred in denying his motion to suppress evidence at the pre-trial hearing on the motion and when the motion was renewed at trial, and 2) the lower court erred by not permitting a defense witness to testify.

Finding merit in neither of these allegations of error, we shall affirm.

I. Motion to Suppress

Appellant asserts that evidence seized from his apartment pursuant to a search and seizure warrant should have been suppressed because the affidavit in support of the warrant contained "false information".

The thrust of appellant's attack is directed at 1) the "errors" in the affidavit that recited his father's residence as "Willow Avenue in Overlea" instead of "Rosedale" and 2) conflicting evidence concerning conversations as to the location of the weapons.

Appellant suggests that once the "contested" information is removed, the remaining information in the affidavit is insufficient to support a finding of probable cause. In support of this alleged "error" appellant cites *Franks v. Delaware*, 438 U.S. 154 (1978).

Justice Blackmun, speaking for the Court in *Franks* at 171-72, stated:

"In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's

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attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. *The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.* On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Because of Delaware's absolute rule, its courts did not have occasion to consider the proffer put forward by petitioner Franks. Since the framing of suitable rules to govern proffers is a matter properly left to the States, we decline ourselves to pass on petitioner's proffer. The judgment of the Supreme Court of Delaware is reversed, and the case is remanded for further proceedings not inconsistent with this opinion." (Footnote omitted, emphasis added.)

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In the present case, appellant received a hearing based on his allegation that the affidavit contained "false" information.

Conflicting evidence was produced at the hearing on the motion to suppress at the conclusion of which the lower court (Higinbothom, J.) stated:

"Now, it's true the wrong address was given for the father's home and Corporal Kelly explained how he did that. He didn't use the best judgment in doing that, it's certain. There's no question about that but in my opinion that's a red herring, if he described both homes and issued a search warrant for both homes and subsequently withdrew the second warrant on the home because they realized it was not based on the correct information, thus he had not followed up with the tip but the search warrant for this home would be good for probable cause unless we have to excise all of this. . . .

It's true the father's house was incorrectly described and its name was given wrong but that doesn't take away from the validity of the warrant. I have another reason too, that Captain [sic] Kelly when he was testifying, said that if the information received from the informant was as listed on the printed or typed statement, which Defendant put in as Exhibit one, which says that the guns were in his parent's residence, if that were the only information that he received from Corporal Quoos there would be no reason to ask for a search warrant for two residences, but he was very positive that Corporal Quoos told him the information, it was in either of the two places and I think that backs up what he said. So, for

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those reasons I feel all of the standards that are required have been met and I feel that there was probable cause for issuing this search warrant and I would, therefore, deny the Motion to Suppress any evidence received on the basis of the search warrant."

Based upon the record before us, giving credence to the lower court's opportunity to observe the witnesses' demeanor and listen to the testimony, we cannot say he was clearly erroneous in denying appellant's motion to suppress.

Appellant next contends the trial court erred in not granting the motion to suppress when it was renewed at trial. This argument is based upon the trial testimony of Melanie Treadway. At trial she testified that she told the police that the weapons were at the residence of appellant's father and *not* at the residence of appellant *or* his father. Subsequent to Treadway's testimony, appellant renewed his motion to suppress.

Maryland Rule 736 g.2. states in part:

"If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, in the exercise of its discretion, grants a hearing *de novo* on a renewal of the motion."

As stated, *supra*, there was conflicting testimony concerning that portion of the affidavit reciting the alleged location of the weapons. Cognizant of the hearing on the pre-trial motion to suppress and the court's determination at that hearing, the lower court was not obligated to "reopen" the motion to suppress.¹ The testimony of Treadway at trial does not take away from the earlier finding of the court that Corporal Kelly

¹We note that Treadway did *not* testify at the pre-trial hearing.

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was advised the weapons were *either* at appellant's apartment or his father's house.

We cannot say, under the facts as presented, that the lower court abused its discretion when it denied appellant's request to renew the motion to suppress.

II. Testimony

Appellant claims the lower court erred when it refused to allow a defense witness to testify. The testimony of the witness concerned her "knowledge" that the police were looking for two persons and two weapons. This information was allegedly given to the prospective witness on June 10, 1980, before the police on June 25, 1980, determined that two weapons were involved.

The basis of the proposed testimony was to attack in part the credibility of the person (later identified as Treadway) who made an anonymous phone call to the police indicating two guns and two people were involved in the shooting. The fact that the police were looking for two people and two guns was not offered for the "truth of the matter asserted" but to depict that people other than the police were aware of what was going on in the case.

The lower court recognized the attempt being made by appellant to get that testimony before the jury. It made the determination that that type of "hearsay" was not admissible under the facts of this case, but was a far-reaching effort by appellant to attack Treadway's credibility when she placed the anonymous phone call.

In considering the admissibility of evidence, the law vests great discretion in the lower court. The exercise of that discretion will not be reversed absent a showing of clear abuse.

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Tripp v. State, 36 Md. App. 459, 481 (1977), *cert. denied*, 281 Md. 745 (1977).

Upon our review of the law and the evidence, we find appellant has not met his burden of demonstrating that the lower court abused its discretion.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

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**IN THE COURT OF APPEALS
OF MARYLAND**

**Petition Docket No. 355
September Term, 1982**

**(No. 1470, September Term, 1981
Court of Special Appeals)**

ALLEN ERNEST YOUNG,

V.

STATE OF MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals answer and conditional cross petition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: October 26th, 1982

**AFFIDAVIT IN SUPPORT OF
SEARCH AND SEIZURE WARRANT**

That the name of you affiant is Corporal Joseph T. Kelly of the Maryland State Police Barrack at Bel Air, Maryland. Your affiant Corporal Kelly has been a police officer for thirteen years and has been regularly assigned to investigate violations of the Maryland criminal code for the past ten years. Your affiant has made hundreds of arrests throughout the state for violations of the aforesaid criminal code;

That on June 10, 1980, at approximately 7:30 AM, Mr. Wilfred Francis Foley, Jr., of 131 Breakwater Court, Joppatowne, Harford County, Maryland, was traveling eastbound on Townwood Drive in Joppatowne when his vehicle was shot at numerous times with a high caliber weapon. The aforesaid victim was struck once in the face by a projectile and was transported to the University Hospital Shock Trauma Unit in critical condition. The on-scene investigation conducted by your affiant revealed that approximately six shots were fired at the victim by an unknown individual who was hiding by the roadside several hundred feet from where the victims car was first struck. Retracing the perpetrator's movements revealed that after the shots were fired, the Joppatowne Shopping Center on U. S. Route 40 and Joppa Farm Road, Joppatowne, Harford County, Maryland;

That by 8:30 AM on June 10, 1980, Troopers were able to locate three separate people who were in the shopping center at the time of the shooting and observed a white male run between the building separation from the rear parking lot of the shopping center, proceed to and use a pay telephone located in front of the carry-out shop in the shopping center and then run hastily back to the rear parking lot of the shopping center. These witnesses remembered the white male because beside themselves, he (the white male) was the only person in the

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shopping center at that time of the morning. Further investigation and debriefing of the witnesses revealed that they are all upstanding citizens; one witness is an employee of the shopping center, one witness a local politician who was withdrawing money from the Equitable Trust Bank after hours system and the third witness a motorcyclist who stopped briefly to rest in the shopping center. These witnesses described the man as white, between 20 and 30 years old, approximately 5'8 to 6' in height, medium build, and medium length brown hair, wearing blue jeans and a checkered off-white colored shirt. Each witness individually stated that the white male was wet from the waist down and appeared, from his actions, to be extremely excited or scared;

That Trooper First Class Arthur B. Lincoln of the Maryland State Police Mobile Crime Laboratory, in conducting the search of the Townwood Drive crime scene, was able to retrieve one spent cartridge and several projectiles from the victim's vehicle. All items appeared to be from a high caliber weapon, possibly a .30 caliber rifle and all items were submitted to the Maryland State Police Headquarters Ballistics Section for further identification;

That subsequent investigation by your affiant revealed that the victim is a Maintenance Superintendent for the Anchor Motor Freight Company located in Dundalk, Baltimore County, Maryland. Further, as part of his duties, the victim was responsible for all business dealings with outside maintenance vendors. Investigation by your affiant revealed that one such vendor, Atlas Welding, Incorporated, a Dundalk based small welding company, was almost entirely dependent on Anchor Motor Freight for its income. Because of this, your affiant began a thorough investigation, with the help of Anchor Motor Freight Company officials, into the dealings of Atlas Welding as they pertain to Anchor Motor Freight and Wilfred Foley, Jr., the herein before mentioned victim. Through investigation, it was

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learned that the former maintenance superintendent for Anchor Motor Freight is a subject named Ronald Tudor, who is the next door neighbor of the victim and, in fact, trained the victim for the position prior to Ronald Tudor leaving Anchor Motor Freight to go with another company. Further, that Ronald Tudor is close friends with Richard Young, the owner of Atlas Welding, and as Maintenance Superintendent, he (Ronald Tudor) was instrumental in getting the business for Atlas Welding. That prior to Ronald Tudor's resignation from Anchor Motor Freight and Wilfred Foley's appointment as Maintenance Superintendent, Atlas Welding Company's business from Anchor Motor Freight averaged in excess of \$500,000 per year. After the inception of Wilfred Foley as Maintenance Superintendent, Atlas Welding's business from Anchor Motor Freight was severely curtailed to only several hundred dollars per week. Additionally, Wilfred Foley discovered that approximately thirty thousand dollars in past due bills were not paid to Atlas Welding by Anchor Motor Freight. This was the direct responsibility of the past Maintenance Supervisor Ronald Tudor and in meetings with the owner of Atlas Welding, Richard Young, Wilfred Foley advised that he, as the current Maintenance Supervisor, would not pay the bills because they were vague in description and apparently fraudulent. Suspecting some illegal scheme, Wilfred Foley contacted Corporate personnel in Cleveland and several meetings were arranged. During this period of time, several arguments ensued between Wilfred Foley and Richard Young and/or other employees of Atlas Welding Company;

That Wilfred Foley stated to your affiant that during the course of one meeting, Richard Young stated the following to Wilfred Foley, "If anyone tried to ruin this business, I'd take this pistol out of my desk and blow their brains out!" Further, that on the day of the shooting (June 10, 1980), Wilfred Foley was to pick up a Corporate Officer at Baltimore Washington International Airport and transport this Corporate Officer to a

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meeting with Ronald Tudor. This meeting with Ronald Tudor was meant to ascertain the extent of possible kickbacks or fraudulent billing by Atlas Welding Company to Anchor Motor Freight. Further, that Wilfred Foley was instrumental in arranging this meeting and that a decision had already been made by Wilfred Foley and the Corporate Officer to completely discontinue all business dealings with Atlas Welding;

That several days after the shooting on June 10, 1980, Mrs. Della Foley, wife of the victim, Wilfred Foley, Jr., telephoned your affiant and appeared to be in an extremely scared and excited state. She advised that at approximately 3:00 AM on the morning after the shooting, she received a telephone call from a friend who stated that she and her husband were in danger and that if a friend of her husbands, identified as Wayne Hoshall, a driver at Anchor Motor Freight, appeared at her home to send him away and not let him in the home. That your affiant, in discussing this matter with Mrs. Foley, learned that Wayne Hoshall was a childhood friend of her husband's and a truck driver at Anchor Motor Freight. Further, that Wayne Hoshall is an extremely good friend of Richard Young, owner of Atlas Welding Company and Richard Young's nephew, Allan Ernest Young, who also works at Atlas Welding. Further, that approximately one week before the shooting, Wayne Hoshall and Allan Ernest Young appeared at the Wilfred Foley residence and borrowed a chain saw from Wilfred Foley;

That your affiant Corporal Kelly caused an investigation to be conducted into the whereabouts of Wayne Hoshall on June 10, 1980. In checking Anchor Motor Freight records and Interstate Commerce Commission logs, it was reported that Wayne Hoshall left Anchor Motor Freight on June 9, 1980 enroute to West Virginia. Records indicated that Hoshall was there from June 9, 1980 until June 12, 1980. In checking these records your affiant found that they were fraudulent and that Hoshall had in fact been in the Baltimore area on the morning of June

10, 1980. Additionally, a foreman at the Anchor Motor Freight told Mr. Richard O'Connell, Safety Director for Anchor Motor Freight, that Hoshall stated to him (the foreman) several days after the shooting, the following: "If Foley hadn't fell over the seat after the first shot, the second or third would have got him." This information was known to investigators and was correct in actuality, but was not revealed to anyone by your affiant, or to other Maryland State Police investigators. Therefore, your affiant would proffer that only the investigators or someone with direct knowledge of the incident would be cognizant of these facts. Because of this, Hoshall was interviewed by your affiant. He stated that he fabricated his logs because he did not want to leave Baltimore as scheduled. He stated that he is close friends of Richard Young and Allan Ernest Young and that he (Hoshall) and Allan Ernest Young frequent bars in the Harford County area. He further stated that he did not know the identity of the perpetrator of this crime and agreed to submit to a Polygraph examination. That Trooper First Class Mark Ward examined Hoshall immediately thereafter with reference to his (Hoshall) knowledge of the shooting, but after several re-examinations was unable to get a correct, discernible reading on Hoshall's charts;

That on June 25, 1980, your affiant Corporal Kelly received a telephone message from Sergeant William Welsh, Maryland State Police Headquarters Ballistic's Section. Sergeant Welsh stated that after examining all evidence submitted and after conducting necessary ballistics tests, he was able to positively discern that seven shots were fired and not six as previously believed. He further stated that two weapons were used and not one as previously believed. He stated that one weapon was a .30 caliber rifle and the other weapon was a .38 caliber or .357 caliber handgun. He further stated that one shot through the windshield of the victim's vehicle was inflicted by the handgun;

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That your affiant Corporal Kelly and other investigators assigned to this matter have not released this information to anyone, even other Maryland State Police personnel. That only three individuals know of this information; your affiant, Sergeant Welsh and Detective Sergeant James Henckel, your affiant's supervisor and a co-investigator in this investigation;

That on July 19, 1980, at 3:40 PM, your affiant Corporal Kelly received a telephone call from Corporal Robert Quoos, Duty Officer at the Bel Air Barrack. Corporal Quoos advised your affiant that he had, only seconds before, received a telephone call on the Baltimore line (879-2101) from a female voice. He stated that the female voice sounded white, young, articulate and extremely concerned over the shooting of Wilfred Foley. Corporal Quoos stated to your affiant that this concerned female citizen advised that she positively knew who shot Wilfred Foley but for her own personal safety, she did not want to be identified or otherwise involved. As such she would not give her name or telephone number but did relate the following to Corporal Quoos. The female citizen stated that a male, whom she knew named Allan Young was the individual who shot Mr. Foley. She stated that the shooting was a "contract" and further that "two" guns were used. She stated that one weapon was a "rifle" and the second weapon used was a "pistol". She went onto state that Allan Young is employed by his uncle at "Atlas Welding Company" and that both guns are secreted in either his residence in Revere Park Apartments or his father's residence on Willow Road in Overlea. She stated that she was positive of this information but was afraid to reveal how or why she obtained this information;

That your affiant Corporal Kelly positively identified Allan Young as:

Allan Ernest Young
2B Fitzgerald Court

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Revere Park Apartments
Harford Road, Carney, Baltimore County, Maryland
White Male, five foot eleven inches, one hundred fifty
pounds, medium length brown hair, date of birth
4-26-55;

That further, Allan Ernest Young, as aforesaid, owns and operates a 1974 Plymouth Duster, red in color, bearing Maryland Registration DKM598. That the records office at the Revere Park Apartments confirm Allan Ernest Young's residence at the aforesaid apartment 2B Fitzgerald Court. That a search of C & P Telephone Company records reveals telephone number 882-4832 to be subscribed by Allan Ernest Young, 2B Fitzgerald Court, Revere Park Apartments, Harford Road, Baltimore County, Maryland. Further, that Allan Ernest Young meets the same physical description as given by the three witnesses interviewed on the morning of the shooting (June 10, 1980);

That your affiant Corporal Kelly positively identified Allan Ernest Young's father as:

Jonathan David Young, Sr.
305 Willow Avenue
Overlea, Baltimore County, Maryland
White male, five foot eleven inches, one hundred
ninety five pounds, date of birth 6-20-40;

That further, Jonathan David Young, Sr., operates a 1967 Dodge truck, Maryland Registration Z29930, listed to Young at the Willow Avenue address and that this vehicle was parked in the 305 Willow Avenue driveway on June 20, 1980;

That further, your affiant, through investigation, was able to positively discern that Allan Ernest Young and Jonathan David Young, Sr., as aforesaid, are avid hunters and own an assortment of handguns and rifles;

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That your affiant, Corporal Kelly, through his knowledge, experience, training and through the course of similar investigations, recognizes that conflicts involving large sums of money, as is the case with Atlas Welding Company and Wilfred Foley as agent for Anchor Motor Freight, are often times given to violence and have, through the course of prior similar investigations, been motive and instrumental in the initiation of violence;

That further, your affiant Corporal Kelly, through the course of prior similar investigations, would recognize that facts such as the amount of shots fired, the direction and location of the victim's body after the shooting and which shots, if any, struck the victim, are facts that are usually concealed by investigators. Further, that only those with first knowledge would know these facts. As such, your affiant would proffer that Wayne Hoshall, as aforesaid, had direct knowledge as to the aforesaid investigative facts;

That your affiant Corporal Kelly, through the course of similar past investigations recognizes that, although evidence of two weapons, a pistol and a rifle, was never revealed, the concerned female citizen had this information and was precise in its content. As such your affiant would proffer that the female citizen caller had direct knowledge of this incident and it's perpetrator;

That your affiant Corporal Kelly, realizing that both Jonathan David Young, Sr., and Allan Ernest Young are hunters, would aver that the weapons are still in the custody of one or both of these individuals and most likely secreted in one of their homes or both of their homes. Further, that an individual who owns firearms and frequently hunts with them is proficient in their usage;

That further, Allan Ernest Young, knows Wilfred Foley, is familiar with his residence and the Harford County area, is

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employed at Atlas Welding Company, the President of Atlas Welding Company is his blood uncle, and that Allan Ernest Young matches the physical description given by witnesses on the day of the shooting, June 10, 1980.

I, Corporal Joseph T. Kelly, hereby swear the foregoing affidavit is true and correct to the best of my knowledge and belief.

SIGNED: /s/
Corporal Joseph T. Kelly
June 20, 1980